RECENT DECISIONS.

ADMIRALTY—TORTS RESULTING IN DEATH—STATE STATUTES. Two vessels, registered in Delaware, collided on the high seas and the plaintiff's intestate was killed. Negligence was found. In an action for the tort it was *held* that the Delaware statute providing for an action resulting in death would be applied in admiralty. In re *Petition of Old Dominion S. S. Co. etc.* (1904) 32 N. Y. Law J. See NOTES, p. 234.

AGENCY—DELEGATION OF POWERS TO SUB-AGENT—ACTS OF DISCRETION. An indemnity company expressly stipulated in its bond that the latter should be binding only when signed by C., its agent. By mutual arrangement, C.'s clerk issued and delivered, C. approving, an unsigned bond, the obligee consenting that C. should sign later. *Held*, the power to issue such a bond, being discretionary, could not be delegated. *Cullinan* v. *Bowker* (1904) 180 N. Y. 93.

Mechanical and purely clerical acts may be delegated to a sub-agent. *Commercial Bank* v. *Norton* (1841) 1 Hill 501; Story, Agency § 14. In matters of insurance, a sub-agent may perform discretionary acts. *Bodine* v. *Ins. Co.* (1872) 51 N. Y. 117; *Arff* v. *Ins. Co.* (1890) 125 N. Y. 57. But this is an exception to the general rule which denies such power. *Pendall* v. *Rench* (1847) 4 McLean (U. S. C. C.) 259; *Catlin* v. *Bell* (1815) 4 Camp. 183; Mechem, Agency, § 186 The issuing of the bond in the principal case seems within the general rule. *Lewis* v. *Ingersoll* (1864) 3 Abb. (N. Y.) App. Dec. 55; *Emerson* v. *Hat Mfg Co.* (1815) 12 Mass. 237.

CARRIERS—ACTION OF OFFICIAL WITHOUT AUTHORITY NO EXCUSE FOR NON-PERFORMANCE. A carrier during the war between China and Japan agreed to forward a consignment of pig-lead from Chicago to Yokohama. The deputy collector of the clearing port, acting without authority, refused to grant clearance papers to the carrying vessel so long as the pig-lead was aboard, on the ground that it was contraband. Such material, however, is not contraband. *Held*, the action of the deputy was no excuse for the delay and the consequent breach. *Northern Pacific R. R. Co.* v. *American Trading Co.* (1904) 195 U. S. 439.

Though non-performance of a contract is excused when performance is made unlawful by an act passed subsequent to the making of the contract, *Bailey* v. *DeCrespigny* (1869) L. R. 4 Q. B. 180; *Heine* v. *Meyer* (1874) 61 N. Y. 171, yet it is not excused by the unauthorized act of an officer, such an act not being an act of the State. *Evans* v. *Hutton* (1842) 5 Scott 670; *Gosling* v. *Higgins* (1808) 1 Campbell 451. The carrier in the principal case assumed that the lead might be declared contraband and since the carrying of contraband is not illegal, *Seto* v. *Lowe* (1799) 1 Johns. Cas. 1; *The Sanctissima Trinidad* (1822) 7 Wheat. 283, 340, such assumption does not involve an engagement to do an unlawful act. The principal case was therefore rightly decided.

CARRIERS—EJECTMENT OF PASSENGER—MISTAKE OF CONDUCTOR. The plaintiff offered to pay his fare from a dollar bill which the conductor honestly believed to be counterfeit, and refusing to accept it, ejected the plaintiff. *Held*, the plaintiff was justified in resisting and could include in his damages the mortification and injury to his character caused by a forcible ejection. *Breen* v. *St. Louis Transit Co.* (Mo. 1904) 83 S. W. 998.

For a comment on this case, which was decided similarly upon the first appeal, see 4 COLUMBIA LAW REVIEW 225.

CARRIERS—MERCHANDISE CHECKED AS BAGGAGE. The baggage master of the defendant railroad accepted merchandise of the plaintiff with knowledge of its character, and checked it as baggage. *Held*, the defendant was liable for the merchandise, as baggage. *Saleeby* v. *Central R. R. Co. of N. J.* (1904) 90 N. Y. Supp. 1053.

The samples of a commercial traveler are not baggage; *Stimson* v. *Railroad Co.* (1867) 98 Mass. 83; neither is an accepted case of merchandise, though marked "glass," *Cahill* v. *The Railway* (1863) 13 Com. B. N. S. 1818; nor goods designed for peddling. *Railroad Co.* v. *Marcus* (1865) 38 Ill. 219. But if goods not baggage are knowingly accepted by the carrier as baggage they must be treated as such. *Railroad Co.* v. *Conklin* (1884) 32 Kan. 55. The baggage master may make a binding acceptance, even where a regulation expressly denies him the power. *Com.* v. *Railroad* (1860) 15 Gray 447.

CARRIERS—DISCRIMINATIONS. Under North Carolina Laws 1899,, p. 301, C. 164, § 13, providing against discriminations for the same service by a railroad, it was *held* that a railroad carrying raw material to factories, cannot charge a lower rate to a shipper, who agrees to reship the manufactured product by that road. *Hilton Lumber Co.* v. *Atlantic Coast Line R. Co.* (N. C. 1904) 48 S. E. 813.

Exclusive patronage will not allow discriminations, *Minacho* v. *Ward* (1866) 27 Fed. 529; nor is the fact that one individual gives heavier traffic to the railroad material, *Hays* v. *Pennsylvania Co.* (1882) 12 Fed. 309, unless the cost of transportation is less because of car-load lots. *Brownell* v. *Railroad* (1891) 4 Interstate Com. Rep. 285. On the other hand, it has been held that differences between two towns in population and tonnage traffic justify different rates. *Detroit, G. H. & M. Ry. Co.* v. *Interstate Com. Com.* (1896) 74 Fed. 803. The question seems to be one of economics rather than of legal theory. In passenger cases, the economic question does not arise, so that party-tickets are allowable. *Interstate Com. Com.* v. *B. & O. Railroad* (1892) 145 U. S. 263.

CONSTITUTIONAL LAW—FOREIGN CORPORATIONS—REVOCATION OF LICENSE. The plaintiff, a foreign insurance company, was licensed to do business in Kentucky. Ky. St. 1903, § 631 provides that if any foreign insurance company shall, without the consent of the adverse party, sue in, or remove a suit to, a federal court, it shall be the duty of the insurance commissioner to revoke its license. The plaintiff did remove a suit to a federal circuit court, without the consent of the adverse party. *Held*, an injunction will not be granted restraining the insurance commissioner from revoking the license. *Traveller's Ins. Co.* v. *Prewitt, Ins. Comm'r.* (Ky. 1904) 83 S. W. 611. See NOTES, p. 231.

CONSTITUTIONAL LAW—POWER OF ADMINISTRATIVE OFFICER. Two Chinese children were refused admission to this country. They were the adopted children of a Chinese merchant who had a domicil in Philadelphia. An appeal was taken, as provided by statute, to the Secretary of Labor and Commerce, and he affirmed the decision excluding the children. Writs of habeas corpus and certiorari were brought to the United States courts. *Held*, the decision of the Secretary of Labor and Commerce is not final and the children must be released. *In the Matter of Fong Yim* (S. D. of N. Y. 1905) 32 New York Law Journal 1349.

While as a matter of policy a distinction might be taken between adopted children and natural children, no very strong reason for such a view appears. In the absence of such a distinction the domicil of minor children is, under the circumstances of the case, the domicil of the father. See *Kennedy* v. *Ryall* (1876) 67 N. Y. 379, 386. Hence the question

seems directly raised as to the right of an administrative officer to exclude finally persons claiming citizenship. The appeal to the Secretary of Labor and Commerce insisted on by the United States Supreme Court, *U. S.* v. *Sing Tuck* (1904) 194 U. S. 161, is not wanting here, and it would seem that the carrying of this case to that court could secure a final adjudication in the matter. 4 COLUMBIA LAW REVIEW 290; 4 id. 437.

CONSTITUTIONAL LAW—REAL PROPERTY—RIGHT TO TAKE GAME. A statute made it unlawful for non-residents to take game within the State, and under it the defendant, a non-resident landowner, was arrested. *Held,* the right to take game is a property right, inherent in the ownership of land, and the statute was unconstitutional within the Fourteenth Amendment. *State* v. *Mallory* (Ark. 1904) 38 S. W. 955. See NOTES, p. 241.

CONTRACTS—ACTIONS—PARTIES JOINT AND SEVERAL. One of three executing promisees brought an action for breach of a contract, joint in form. *Held,* in the absence of allegations and proof of a several interest, the language will control, and the other promisees must be joined. *Fisher Textile Co.* v. *Perkins* (1904) 90 N. Y. Sup. 993.

Unlike promisors, the relationship of promisees is determined by both language and interest. *Slingsby's Case* (1587) 5 Rep. 18; *Sorsbie* v. *Park* (1843) 12 M. & W. 146. Seemingly when the language is clear and no contrary interest appears, the language will control; *Wootton* v. *Steffenoni* (1843) 12 M. & W. 129, 134; but "if the legal interest in the covenant and in the cause of action" is several, the contract is several though joint in terms. *Wotton* v. *Cooke* (1574) Dyer 337b; *Shaw* v. *Sherwood* (1599) Cro. Eliz. 729; *Wilkinson* v. *Lloyd* (1676) 2 Mod. 82; *Withers* v. *Bircham* (1824) 3 B. & C. 255; *Hees* v. *Nellis* (1873) 1 Thomp. & C. 118; and, if these interests be joint, the covenant is joint, though several in terms. *Eccleston* v. *Clipshan* (1668) 1 Saund. 153 n (1); *Copen* v. *Barrows* (1854) 1 Gray 376. So where only the cause of action is joint, and the interest is several, suit must be brought jointly. *Rolls* v. *Yates* (1611) Yelv. 177; *Coryton* v. *Lithebye* (1670) 2 Saund. 115 (116a) and n (2); *Anderson* v. *Martindale* (1801) 1 East. 497; *Foley* v. *Addenbrooke* (1843) 4 Q. B. 197; contra *Tippett* v. *Hawley* (1688) 3 Mod. 203. Generally, where the interest is several and the covenant in terms is joint and several, the action should be several, *Owston* v. *Ogle* (1811) 13 East 538, "unless such construction be expressly excluded by the terms." *Sharp* v. *Conkling* (1844) 16 Vt. 355. But wherever promisees may be joined they must be. *Petrie* v. *Bury* (1824) 3 B. &. C. 353. On principle, it seems clear that as to joint or to several contracts, the intention should control with promisees as with promisors, and that the interest test should be applied only in cases of covenants, joint and several.

CONTRACTS—COMPELLING EMPLOYER TO EMPLOY UNION LABOR. In an action on a promissory note given as security for the performance of an agreement between a labor union and an employer whereby the latter was bound not to engage labor other than members of the union and to discharge all non-union men it was *held* that the unlawful character of such a contract is a good defence. *Jacobs* v. *Cohen* (1904) 90 N. Y. Supp. 854.

A non-union man sought an injunction to restrain his employer from discharging, under a contract with a labor union, employees who refused to join such union. *Held* an employee has no such right to retention as will entitle him to interfere with the master's right to discharge. *Mills* v. *U. S. Printing Co.* (1904) 91 N. Y. Supp. 185. See NOTES, p. 239.

CONTRACTS—DEFENCE OF ILLEGALITY—STOCK SPECULATING ON MARGINS. In an action on two checks given by the defendant to his broker the evidence was that the stocks were bought on margin, that the checks were

for the purchase of options on cotton, and that the stocks were never assigned nor given to the defendant. *Held*, the facts do not support a defence that it was a gambling transaction. *Kendall* v. *Fries* (N. J. 1904) 58 Atl. 1090.

The English courts treat the relation between broker and customer on the basis of agency. Provided the deal is genuine as between the broker and third parties, it is immaterial that the broker knew that his customers did not expect to receive the stock bougbt for him nor to deliver stock sold for him, but expected merely to deal in differences. *Thacker* v. *Hardy* (1878) 4 Q. B. Div. 685. The American tendency is to regard dealings in margins as involving the relation of pledgor and pledgee, the broker holding the stock as security for the balance of the price. *Markham* v. *Jandan* (1869) 41 N. Y. 235; *Gillett* v. *Whiting* (1890) 120 N. Y. 402. But where the stocks are never transferred to the customer and he remits only to cover losses, it would seem to be strong evidence of a dealing in differences, *Sharp* v. *Stalker* (1902) 63 N. J. Eq. 596; particularly where there is a great disproportion between the cash furnished by the customer and the amount of sales made for him. *Watte* v. *Costello* (1891) 40 Ill. App. 307. *Flagg* v. *Baldwin* (1884) 38 N. J. Eq. 219. The intent of both parties to gamble must be shown. *Pixley* v. *Boynton* (1875) 79 Ill. 351.

CORPORATIONS—JURISDICTION OF FEDERAL COURT—UNINCORPORATED ASSOCIATION. Suit was brought by a citizen of Michigan against "The Board of Trustees of the Ohio State University," the averment as to the citizenship being that the defendant was created and existed by virtue of the law of Ohio, had power to sue and be sued, to make contracts, hold property, have a seal, etc., and was a citizen of Ohio. *Held*, there was no jurisdiction, but that if there had been added allegations that all the members of the board were citizens of Ohio, there would be jurisdiction, though the individual members were not made defendants. *Thomas* v. *Board of Trustees of the Ohio State University* (1904) 25 Sup. Ct. 24.

It is commonly said that a corporation is a citizen of the State incorporating it. *Fenn. R. Co.* v. *St. Louis, etc., R. Co.* (1886) 118 U. S. 290, 295; *Louisville, etc., R. Co.* v. *Letson* (1844) 2 How. 497. Mr. Justice STORY, however, declared in *Muller* v. *Dows* (1876) 94 U. S. 444, that a corporation was not a citizen of any State and this appears to have been the original view. *Bank of U. S.* v. *Deveaux* (1809) 5 Cranch. 61. In the early cases the inquiry seems to have been as to the citizenship of the stockholders, who were nevertheless, except in very early cases, *Bank of U. S.* v. *Devereaux*, supra, conclusively presumed to be citizens of the incorporating State. *Muller* v. *Dows*, supra. In the principal case, since it is undisputed that no incorporated body can be a citizen of a State, *Chapman* v. *Barney* (1899) 129 U. S. 677, and since the court was unwilling to extend the rules as to presumption of citizenship of members of a corporation to members of an association, no diverse citizenship appeared. That there would be jurisdiction if the individual members were alleged to be citizens of Ohio though they were not parties of record seems to be deciding the case on the analogy of the early cases of corporations with the difference that no presumptions are entertained as to the citizenship of the members. The court has before determined the point of jurisdiction in cases similar to this one as it was presented in the Circuit Court, *Chapman* v. *Barney*, supra; *Gt. So. Fire Proof Hotel Co.* v. *Jones* (1900) 177 U. S. 449, but it is believed that the further question is decided for the first time.

CORPORATIONS—ULTRA VIRES ACTS—LIABILITY OF STOCKHOLDERS. The plaintiffs were creditors of a Kansas corporation, who sought to enforce the statutory liability of stockholders. The entire assets of this corporation and its control had been transferred to a Missouri corporation which assumed all the debts and liabilities of the Kansas corporation.

This act was ultra vires of the Missouri corporation and, upon its becoming insolvent, the creditors of the Kansas corporation sought to hold the stockholders of the latter in their statutory liability under the laws of Kansas. *Held*, that the transfer, being beyond the powers of the Missouri corporation was absolutely void, and a mere nullity, and that all assumption of liability under such a transfer was ineffectual to release the stockholders of the Kansas corporation from their liability under the laws of Kansas. *Anglo-American Co.* v. *Lombard* (1904) 132 Fed. 721. See NOTES, p. 235.

CRIMINAL LAW—STATUTORY OFFENCE—SALE TO COMPLY WITH STATUTE. An Ohio statute provided under a penalty, that no one should "offer or expose for sale, sell or deliver, have in possession with intent to sell," oleomargarine containing artificial coloring matter; also that anyone having for sale goods included in the act should, under penalty for refusal, deliver a sample for analysis to anyone who demanded the same and paid the price. The defendant delivered oleomargarine containing artificial coloring to an official inspector who demanded the same for analysis and paid the price. *Held*, the defendant was guilty on an affidavit charging him with having unlawfully "sold and delivered." *State* v. *Rippeth* (Ohio, 1904) 72 N. E. 298:

An act to be punishable must come within the mischief aimed at by the statute. *State* v. *Wray* (1875) 72 N. C. 253. The aim is to be gathered from the whole statute. *Comm.* v. *Hadley* (1846) 11 Met. 66. In the principal case the statute is for the protection of the public against fraud and injury to health. *Waterbury* v. *Newton* (1888) 50 N. J. Law 534; *State* v. *Kelly* (1896) 54 Ohio St. 166, 180. One who receives pay from an officer for such a sample only under protest does not sell within the meaning of the act. *Dinkelbihler* v. *State* (Ohio, 1897) 4 N. P. 313. Such a statute is not intended to prevent the sale of a sample in such a case, when it expressly commands it under penalty. Bates Ann. Stat. § 4200; *State* v. *Dairy Co.* (1900) 62 Ohio St. 123. This decision may be supported on an indictment charging the having in one's "possession with intent to sell." Bates' Ann. § 4200.

EVIDENCE—ADMISSION OF EVIDENCE—PRIVILEGED STATEMENTS BEFORE A SPECIAL TRIBUNAL. The plaintiff as beneficiary under a life insurance policy held by her deceased husband in the defendant order sued to recover the amount due on the policy. A by-law of the beneficial association provided that death claims should be submitted to a council of the order and that there should be no recourse to the courts. The defendant, in good faith, but on the evidence of a physician who attended the deceased, rejected the plaintiff's claim on the ground of the fraudulent concealment of a material fact by the insured. *Held*, the physician's evidence was privileged within Comp. Laws 1897, § 10,181, and could not be used even before a special tribunal. The adjudication of the council being therefore erroneous, was no bar to an action on the policy. *Dick* v. *Supreme Body of International Congress* (Mich. 1904) 101 N. W. 564.

While statutes like the one in the principal case make privileged the communications of a patient to his physician; 4 COLUMBIA LAW REVIEW, 438; yet a special tribunal is not bound by the common-law rules regulating the trial of actions or the admission of evidence. It can arrange its own procedure and the decision of such a tribunal will not be disturbed by the courts unless it was procured by fraud. 5 COLUMBIA LAW REVIEW 52. The question remains whether the statutory rules of evidence are binding on such a tribunal. While the object of these statutes, however unfair their operation, is the protection of the confidential relation of physician and patient, 5 COLUMBIA LAW REVIEW 646, Greenleaf on Evidence § 247a, such a statute is in derogation of the common law, and the

legislative intent to extend the restriction beyond the State clourts should clearly appear. That intent is not evident in the statute involved in the principal case.

LANDLORD AND TENANT—CONSTRUCTION OF COVENANT TO KEEP IN REPAIR. A landlord sued on a covenant in a lease by which the tenant agreed "to keep said premises in good repair." *Held*, the tenant was obliged to put the premises in good repair, as well as keep and leave them so. *Lehmaier* v. *Jones* (1905) 32 N. Y. L. J. 1363.

Such a clause in a lease would seem to put on the tenant merely the obligation to deliver the premises in as good condition as that in which he received them. *West* v. *Hast* (Ky. 1832) 7 J. J. Marsh 259. To the English courts, however, the clause means "to put premises in good repair and so keep them." *Proudfoot* v. *Hart* (1890) L. R. 25 Q. B. Div. 42. Such is the construction of the clause in a testamentary trust. *Cook* v. *Cholmondeley* (1858) 4 Drew 326. The principal case follows the rule previously laid down in New York. *Green* v. *Eden* (1874) 2 T. & C. 582. The reason is suggested by Baron PARKE: "The tenant cannot keep the premises in good repair without first putting them into it." *Payne* v. *Hayne* (1847) 16 M. & W. 541.

MANDAMUS—INTERSTATE COMMERCE ACT—SCOPE OF THE WRIT OF MANDAMUS UNDER THE STATUTE. The defendant railroad discriminated against the relator by allowing the latter's mine a smaller percentage of its cars for shipment of coal than it was entitled to by a comparison of its output with that of the other mines on the line. Interstate Commerce Act, sec. 3. *Held*, by mandamus the court may compel the railroad not merely to desist from such discrimination but to furnish the relator a fair proportion of its cars, which proportion was found as a fact by the court. *West Va. N. R. Co.* v. *U. S.* (C. C. A. 4th Circ. 1904) 37 Chicago Legal News 123.

The right to issue the writ in the case is clear under the statute. Interstate Commerce Act. The common law rules being still applicable, High Extr. Leg. Rem. 88; *Kimball* v. *Union Co.* (1872) 44 Cal. 173, the court can compel performance of specific acts, but only where the legal right thereto is clearly and distinctly made out. *People* v. *C. & A. R. R.* (1890) 131 Ill. 175. It would seem that the relative output of various coal mines could be accurately determined so that a specific allotment of cars could be made on that basis and enforced by a mandamus, the right being a clear one under the Interstate Commerce Act, section 3.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF FIRE DEPARTMENT EMPLOYEE. An employee of the fire department of the defendant city while hauling coal necessary for use in such department negligently injured the plaintiff. *Held*, the city was not liable for the negligence, as the employee of the fire department was engaged in a public service. *Mauske* v. *City of Milwaukee* (Wis. 1904) 101 N. W. 377.

A city is not liable for its negligence in discharging a public service unless expressly made so by statute, though it is liable for negligence in the performance of acts done in its private character. *Oliver* v. *Worcester* (1869) 102 Mass. 489; *City of Galveston* v. *Posnainsky* (1884) 62 Tex. 118. There is a conflict as to what are and what are not public services. *Judge* v. *City of Meriden* (1871) 38 Conn. 90; *Barney Dumping Boat Co.* v. *City of New York* (1889) 40 Fed. 50; *Missano* v. *The Mayor* (1899) 160 N. Y. 123. The fire department has generally been held to be a public service; *Hayes* v. *City of Oshkosh* (1873) 33 Wis. 314; *Wild* v. *City of Paterson* (1885) 47 N. J. L. 406; and a municipal corporation is held not liable for neglect to get proper machinery; *Wheeler* v. *City of Cincinnati* (1869) 19 Ohio St. 19; or for negligence of a fireman going to a fire;

Hayes v. *City of Oshkosh*, supra; or for the negligence of an employee while exercising the fire engine horses. *Gillespie* v. *City of Lincoln* (1892) 35 Neb. 34. It would seem that the principal case would fall within the established rule. See 2 COLUMBIA LAW REVIEW 411.

PLEADING AND PRACTICE—CONTEMPT—PUBLICATION CONCERNING TERMINATED CAUSE. The defendant had been convicted on a criminal prosecution. After judgment rendered and payment of fine by the defendant, he published in a newspaper an article charging that the indictments were found under the influence of the judge, and that he was actuated by vicious motives in the conduct of the case. *Held*, that the defendant was guilty of contempt. *Burdett* v. *Commonwealth* (Va. 1904) 48 S. E. 878.

As the origin of the offence of criminal contempt lay in the fiction that the king in the person of his judges presided over the Courts of Westminister, *Neel* v. *State* (1849) 9 Ark. 259, 264, and that contemptuous conduct toward them was a mild form of treason, 3 COLUMBIA LAW REVIEW 45, in England scandalization of the court, not with reference to a pending cause, constitutes contempt. *Queen* v. *Gray* [1900] 2 Q. B. 36. In the United States, however, the idea of offence to the sovereign was supplanted by the idea of interference with the administration of justice, to prevent which the court possesses the inherent power to punish for contempt. Ex parte *Robinson* (1873) 19 Wall. 505; *Cartwright's Case* (1873) 114 Mass. 230; *Watson* v. *Williams* (1858) 36 Miss. 331. Interference with the administration of justice, therefore, should be the test of criminal contempt, whether the interference be with a pending cause or with the future course of justice, 4 Bl. Com. 285. But the general rule in the United States is that a libellous attack on a court concerning a cause already terminated is not a criminal contempt. *Storey* v. *People* (1875) 79 Ill. 45; *Cheadle* v. *State* (1886) 110 Ind. 301; *Rosewater* v. *State* (1896) 47 Neb. 630. From the effect of such act on the course of justice it is hard to see why the distinction exists. *State* v. *Morril* (1855) 16 Ark. 384. See *Com.* v. *Dandrige* (1824) Va. Cas. 408, 421. The principal case would seem to adopt the better rule.

PLEADING AND PRACTICE—DEFECTIVE INDICTMENT—AIDER BY VERDICT. The defendant was arraigned upon an indictment which did not allege facts constituting a crime. He pleaded not guilty, was found guilty; a motion for a new trial because the verdict was against the evidence was overruled and sentence pronounced. An appeal to the Appellate Division was overruled, and on appeal to the Court of Appeals the defendant raised a question as to the sufficiency of the indictment. *Held*, not having previously done so as prescribed by the Code he had waived his right. *People* v. *Wiechers* (N. Y. 1904) 179 N. Y. 479. See NOTES, p. 237.

QUASI CONTRACTS—MONEY HAD AND RECEIVED—FIDUCIARY RELATIONSHIP. The defendant received an invalid payment of a deposit from a bank, which was rightfully due the plaintiff. The plaintiff sued the defendant for money had and received. *Held*, as there was no fiduciary relationship between the parties, the plaintiff could not recover under such counts. *Cole* v. *Bates* (Mass. 1904) 72 N. E. 333.

To require a fiduciary relationship in a suit for money had and received does away with recovery under the doctrine of waiver of tort. *Hudson* v. *Silliland* (1867) 25 Ark. 100; *Knapp* v. *Hobbs* (1871) 50 N. H. 476. Where such fiduciary relationship exists, recovery is upon trust principles. In re *Hallets' Estate* (1879) L. R. 13 Ch. D. 696. The principal case is correct, however, in refusing recovery. The plaintiff's relationship with the bank, being that of creditor, he can still collect from it, since the defendant has not the plaintiff's money, but that of the bank, against whom only has a tort been committed. *Moore* v. *Moore* (1879) 127 Mass. 22;

Keener on Quasi-Contracts, p. 167. Recovery is allowed on the theory of ratification where one person presumed to act for another, but here the defendant claimed adversely. *Vaughan* v. *Mathews* (1849) 13 Q. B. 187.

REAL PROPERTY—FIXTURES. In an action, brought by the vendor of real estate to recover for the conversion of cut stone and structural iron, bought for the purpose of finishing an uncompleted house and lying in a lot sold to the vendee, it was *held* that the materials passed by the vendor's warranty deed of the lot. *Byrne* v. *Werner* (Mich. 1904) 101 N. W. 555.

Where chattels are actually joined to the freehold, though not so as to become an integral part of it, they are regarded as real or personal property, according to the intention evidenced by the acts of the parties. 2 COLUMBIA LAW REVIEW 407. If the chattel be not physically connected, as in the principal case, it is said to be constructively affixed, if there be a manifest appropriation of it to the land for a permanent purpose; it then passes with the realty by the rule of destination. *Hackett* v. *Amsden* (1885) 57 Vt. 432; *Conklin* v. *Parsons* (1849) 1 Chandler 240; *Patton, Malone & Co.* v. *Moore* (1880) 16 W. Va. 428.

REAL PROPERTY—IMPROVEMENT OF STREETS BY MUNICIPALITY—HIGHWAY EASEMENT—STREET IMPROVEMENTS. The defendant, owner in fee of a street, under legislative authority and for the purpose of bridging a seventy foot bluff in the street, built a viaduct fifty feet high along the street, leaving the surface undisturbed except for the supporting pillars. The plaintiff, an abutting owner, seeks an injunction and damages for interference with his easements of egress and ingress and light and air. *Held*, the viaduct being a proper means of rendering the street usable by the public, the defendant is not liable. *Sauer* v. *City of New York* (1904) 180 N. Y. 87.

The court assimilates the case to *Radcliff's Executors* v. *The Mayor* (1850) 4 N. Y. 195 where the city was held to be exempt from liability for damages consequential upon the properly conducted grading of its street, and approves *Fries* v. *N. Y. & H. R. R. Co.* (1901) 169 N. Y. 270 where this doctrine of non-liability was extended to a case wherein the easements of the abutting owner was permanently impaired there by the maintenance of an elevated structure. The principal case is another illustration of the desire on the part of the court to limit the anomalous doctrine of the "Elevated Railroad Cases" by confining its application to the facts there involved. According to those cases the easement is a property right protected by the Constitution. 2 COLUMBIA LAW REVIEW 158 and 492; 4 id. 440.

TORTS—CONSPIRACY—AVERMENT OF OVERT ACTS. The plaintiff sued the defendants for damages, alleging that he had been injured by a conspiracy between them and set out in his complaint the overt acts committed pursuant thereto, consisting of slanderous words, malicious prosecution and an abuse of legal process. The defendants demurred to the complaint on the ground that under § 484 Code Civ. Proc. an action for slander could not be joined with an action for malicious prosecution and abuse of legal process. *Held*, the demurrer should be overruled as conspiracy was the gist of the action. *Green* v. *Davies* (1905) 32 N. Y. Law Journal 1395. See NOTES, p. 233.

TORTS—DECEIT—NECESSITY OF SCIENTER. The ceiling in an apartment house leased by the defendant to the plaintiff became unsafe. The defendant asserted as of his own knowledge that the ceiling was safe, honestly believing his assertion. Later, the ceiling fell and injured the plaintiff's wife. *Held*, there could be no recovery in an action of deceit, a scienter not having been alleged. *Kushes* v. *Ginsburg* (1905) 32 N. Y. L. J. 1183.

Belief in the truth of a statement is not a defence when it is made as of the defendant's knowledge. *Hadsack* v. *Osmer* (1897) 153 N. Y 604; *Cabot* v. *Christie* (1869) 42 Vt. 121; *Litchfield* v. *Hutchinson* (1875) 117 Mass. 195. The court in the principal case seems to have been misled by the case of *Kountze* v. *Kennedy* (1895) 147 N. Y. 124, in which the expression was one of belief, not of knowledge. In such cases belief in the truth of the assertion is usually a defence. *Hawley* v. *Smith* (1884) 46 N. J. L. 380.

TORTS—STREETS—LIABILITY OF CONTRACTOR IN THE ABSENCE OF NEGLIGENCE. The defendant was engaged in blasting in a public street for an underground railway. The plaintiff, while lawfully using the street, was struck by a stone from a blast. *Held*, LAUGHLIN and HATCH, *JJ.*, dissenting, the defendant is liable in the absence of negligence. *Turner* v. *Degnon McLean Contracting Co.* (1904) 90 N. Y. Supp. 948.

It would seem, as the dissents maintain, that no liability should attach to one engaged in a lawful business on a public highway in the absence of negligence. Elliott on Roads and Streets, 2d ed., 856; Thompson on Negligence, vol. 1, p. 344. No reason appears why an exception should be made in the present case. The prevailing opinion cites *St. Peter* v. *Denison* 58 N. Y. 416, in which the defendant, who was engaged in working on the Erie Canal, threw earth on an adjoining proprietor's land. In that case, however, there was a trespass on real property, while it would be difficult to say that in this case it was trespass to occupy the surface of the street, the tunnel being constructed through an opening along the surface. It would seem therefore that the dissenting opinion was correct.

TRADE MARKS—INFRINGEMENT—MEASURE OF DAMAGES. On suit to restrain the infringement of complainant's trademark, it was *held*, the profit which the complainant would have made on the sale of the same amount of his goods as the defendant has sold of the spurious is a proper measure of the complainant's damages. *Walter Baker & Co.* v. *Slack* (1904) 130 Fed., 134. See NOTES, p. 238.

WILLS—RELEASE IN FRAUD OF CREDITORS—RIGHT OF PERSONAL REPRESENTATIVE TO IMPEACH. An administrator sued on a debt as due decedent's estate in which suit the defendant pleaded a written release by the decedent. *Held*, the administrator cannot impeach the release by showing that it was given in fraud of creditors. *Hayes* v. *Frey* (Nev. 1904), 83 S. W. 772.

At common law a conveyance in fraud of creditors was binding between the parties, and the representative was estopped from denying the validity of the decedent's acts. *Burton* v. *Farinholt* (1882) 86 N. C. 260. But the creditors could proceed against the grantee as executor de son tort. *Osbourne* v. *Moss* (N. Y., 1810) 7 Johns. 161. By such a statute as exists in the jurisdiction of the principal case in many of the United States the representative has been declared a trustee for creditors and can recover property fraudulently conveyed as assets. *Richardson* v. *Cole* (1900) 160 Mo. 372. *Keller* v. *Shaeffer* (1876) 29 Oh. St. 264; *Parker* v. *Flagg* (1879) 127 Mass. 28; *Rozelle* v. *Harmon* (1890) 103 Mo. 339. There seems no good reason why he should not be allowed to impeach the transactions of intestate by showing fraud without the necessity of having the creditors first proceed in chancery.